92-822

No. 92-

Supreme Court, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARICELA MCFARLAND, on her own behalf and on that of her daughter, KRISTEL, *et al.*,
Petitioners,

v.

RICHARD B. CHENEY, Secretary, Department of Defense, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DAVID J. KIYONAGA
Counsel of Record
JOHN C. KIYONAGA
KIYONAGA & KIYONAGA
117 South Fayette Street
Alexandria, VA 22314
(703) 739-0009
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the doors of the United States courts are closed to Panamanian civilians who were injured in the 1989 invasion of Panama by the United States Armed Forces, and who have sued to enforce the provisions of Article XX, *Claims*, of the Agreement in Implementation of Article IV of the Panama Canal Treaty, September 7, 1977, United States-Panama, T.I.A.S., No. 10032, which provides for the submission and "settlement" of private claims against the United States Forces "arising from damages caused in the performance of their official duties."

PARTIES BELOW

This action comprises two lawsuits consolidated on appeal and brought by one class, the non-combatants injured in person or property and the survivors of non-combatants killed in the combat of the United States invasion of the Republic of Panama in December, 1989. The class does not include the victims of the looting which occurred in the wake of the combat operations. Representative plaintiffs are: Maricela McFarland, on her own behalf and that of her daughter, Kristel; Cenelia O. Berrios De Pitti, on her own behalf and that of her late husband, Heriberto Pitti; Luis Alberto Riano H., on his own behalf and that of his late son, Luis A. Riano Q.; Gilberto Ramon Arosemena; and Ricardo Arango Arias; all of the aforementioned being or having been individual Panamanian citizens. The final representative plaintiff is Isla Margarita Development, Inc., a corporation incorporated and doing business in the Republic of Panama.

The entire class appealed the two dismissals by the district courts. It now petitions this Court to review the summary affirmance of the dismissal of the second lawsuit, the appeal of which had been consolidated by the Court of Appeals with the appeal of the first lawsuit's dismissal.

The defendants in both district court lawsuits were the appellees in the consolidated appeals and are the respondents herein, Richard B. Cheney, Secretary of Defense of the United States of America and Colonel Jack F. Lane, Jr., Commander of the United States Army Claims Service. Since the commencement of this action, Colonel Lane has been replaced as Commander of the United States Army Claims Service by Colonel Joseph C. Fowler, Jr.

RULE 29.1 STATEMENT

Isla Margarita Development, Inc. is a corporation incorporated and doing business in the Republic of Panama. It has no subsidiaries and its stock is owned by individual investors.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	ii
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
TREATY AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. THIS CASE PRESENTS AN ISSUE OF COMPELLING IMPORTANCE	6
II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FEDERAL COURTS	7
A. The Treaty Is Self-Executing	7
B. The Rights Created by Article XX Accrue to Panamanian Citizens	9
C. The Rights Created by Article XX Are Susceptible to Judicial Enforcement	10
III. JUDICIAL CONSIDERATIONS	12
CONCLUSION	12
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	5a
APPENDIX D	20a
APPENDIX E	24a
APPENDIX F	25a
APPENDIX G	30a
APPENDIX H	33a

TABLE OF AUTHORITIES

Cases Page

Asakura v. Seattle, 265 U.S. 332 (1924) 9
Brown v. Board of Education, 347 U.S. 483 (1954) 7
Columbia Marine Services, Inc. v. Reffet Ltd., 861 F.2d 18 (2d Cir. 1988) 12
Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) 9
Cook v. United States, 288 U.S. 102 (1933) 8
Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976) .. 12
Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) 10
Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) 8
Head Money Cases, 112 U.S. 580 (1884) 10
Kolovrat v. Oregon, 366 U.S. 189 (1961) 6
Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979) 12
People of Saipan v. United States Dept. of Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) 9, 10, 11, 12
Rainbow Navigation, Inc. v. Department of Navy, 911 F.2d 797 (D.C. Cir. 1990) 9
Shanks v. DuPont, 3 Pet. 242 (1830) 7
Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971) 8
Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 7, 8, 12
United States v. Bent-Santana, 774 F.2d 1545 (5th Cir. 1985) 12
United States v. Thompson, 928 F.2d 1060 (11th Cir. 1991) 12

Treaty Provisions

Treaty of Panama Canal, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030 ..... *passim*
Art. I
para. 4 ..... 2, 11
Art. II 2, 8

TABLE OF AUTHORITIES—Continued

Page

Art. IV
para. 1 ..... 2, 4
para. 2 ..... 2, 4
Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10032
Art. XX 2, 4
para. 8 ..... *passim*
Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10029 4

Statutory Provisions

10 U.S.C. Sec. 2734 (1988) 2, 5
22 U.S.C. Sec. 3601 (1988) 2, 8, 9
28 U.S.C. Sec. 1254(1) (1988) 2
28 U.S.C. Sec. 1331 (1988) 5

Other

Harris, *Grenada—A Claims Perspective*, The Army Lawyer, Jan. 1986, pp. 7-17 3
International Legal Materials, vol. 17, no. 4, July 1978, pp. 828-9 4
Dire Emergency Supplemental Appropriations Act, Pub. L. 101-302 (1990) 3
Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, Military Law Review, vol. 133, Summer 1991, pp. 32-3 5
Exchange of Instruments of Ratification of Panama Canal Treaties, Department of State Bulletin, July 1978, pp. 52-7 8
Operation Just Cause: One Year After, United States Southern Comand Fact Sheet, Dec. 14, 1990 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-

MARICELA MCFARLAND, on her own behalf and on that of her daughter, KRISTEL, *et al.*,
Petitioners,

v.

RICHARD B. CHENEY, Secretary, Department of Defense, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MARICELA MCFARLAND, *et al.*, hereby petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The first district court order (Appendix "App." B), which incorporates by reference an earlier opinion and order by the same court (App. C), the second district court opinion and order (App. D), and the court of appeals order (App. A) are not reported with the exception of the opinion at App. C which is reported at 736 F. Supp. 1154 (D.C. 1991).

JURISDICTION

The judgement of the court of appeals was entered on June 9, 1992. Timely petition for rehearing was denied on August 12, 1992 (App. E). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) (1988).

TREATY AND STATUTORY PROVISIONS INVOLVED

Article XX, *Claims*, of the Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10032; Article I, paragraph 4, Article II, and Article IV, paragraphs 1 and 2, of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030 are set forth in App. F hereto.

22 U.S.C. Sec. 3601 (1988) and 10 U.S.C. Sec. 2734 (1988) are set forth in App. G hereto.

STATEMENT OF THE CASE

Petitioners are innocent Panamanian civilians who were injured during the invasion of Panama by the United States Armed Forces in December 1989, the most violent episode of Panamanian history.

Shortly after midnight on December 20, 1989, without warning, U.S. Forces opened fire on military objectives at diverse locations in Panama. A number of these objectives happened to be in areas heavily populated by civilians. Most notably, General Manuel Noriega's military headquarters or "Comandancia" sat in the middle of a dense warren of mainly wooden shanties known as "El Chorillo." Residents awoke to find themselves in a hail of U.S. ordinance unparalleled in array or volume since the Viet-Nam War. In the ensuing firefight, dwellings were traversed or set afire by projectiles. Several blocks of the neighborhood were gutted. Similar scenarios were repeated at other places: Colon City, San Miguelito . . . Most of the heaviest fighting took place in the poorest neighborhoods.

Petitioners suffered personal injury, property loss, and death of loved ones in the combat. While the exact size of the class of Petitioners has not been established, the United States Army estimates over 200 civilians killed.[1] Civilians wounded outnumber those killed.

The emergency assistance package for Panama legislated by the Congress in 1990 included no funds for the relief of the innocent victims of the combat.[2]

Following the invasion, many of the Petitioners filed administrative claims with the United States Army Claims Service seeking compensation for their losses and injuries. Innocent civilians injured during the United States invasion of Grenada in 1983 were compensated for their injuries.[3] Nonetheless, Petitioners had their claims summarily rejected by the Army Claims Service on the grounds that no compensation would be afforded for injuries caused by United States combat operations.

Petitioners brought suit as a class in the district court to compel adjudication of their claims and enforce their rights under the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030, [hereinafter the "Treaty"]; specifically Article XX, *Claims*, paragraph 8, of the Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10032, [hereinafter "Article XX"].[4]

---

[1] *Operation Just Clause: One Year After*, United States Southern Command Fact Sheet, Dec. 14, 1990.

[2] Dire Emergency Supplemental Appropriations Act, Pub. L. No. 101-302 (1990).

[3] Harris, *Grenada—A Claims Perspective*, The Army Lawyer, Jan. 1986, pp. 7-17.

[4] Following the Armed Forces' blanket rejection of the administration claims, two lawsuits were filed in the United States District Court for the District of Columbia. The first (No. 91-2405) before the Honorable Stanley Harris, invoked plaintiff's right to claims

Article XX provides in pertinent part:

> Non-contractual claims arising from damages caused in the performance of their official duties by members or civilian employees of the United States Forces to third parties other than the two Governments shall be presented by the injured party through the Joint Committee to the appropriate authorities of the United States Forces for settlement. The authorities of the Republic of Panama may submit advice and recommendations on Panamanian law to the claims authorities of the United States for their use in evalulating liability and amount of damages.

T.I.A.S. No. 10032 (1977).

Article IV, Paragraphs 1 and 2 of the Treaty recite the right of the United States to defend the Canal, indicating that combat to that end falls within the "official duties" referenced in Article XX. Moveover, in ratifying the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10029, the Senate specifically reserved the right of the United States to use military force to maintain Canal operations.[5]

---

adjudication under the Administrative Procedures Act, 28 U.S.C., Secs. 2201 and 2202. The second (No. 91-1438), before the Honorable Gerhard A. Gesell, invoked their right to claims adjudication under the Panama Canal Treaty of Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030, specifically Article XX, *Claims*, of the Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10032. Both lawsuits were dismissed and both dismissals appealed.

The United States Court of Appeals for the District of Columbia Circuit consolidated the appeals, (Nos. 91-5173 and 92-5022, respectively) under the number assigned the first appeal and summarily affirmed both dismissals.

Petitioners appeal only the affirmance of the dismissal of the second, treaty based, lawsuit.

[5] International Legal Materials, vol. 17, no. 4, July 1978, pp. 828-9.

President Bush stated the defense of the Canal as one of the justifications for Operation Just Cause.[6] There is no doubt that U.S. military operations during the invasion fall within the purview envisioned in Article XX.

Both the language and the negotiation history of Article XX establish that it intended to provide for the adjudication of claims for losses and injuries arising from these combat operations. Article XX contains no exclusion for combat operations. It is addressed broadly to private claims. Moreover, the record below contains the affidavit of Panama's chief Treaty negotiator confirming the intent not to exempt claims arising from combat operations. App. H at 33-4a.

A reading of Article XX to permit a blanket exclusion of claims arising from combat operations would render Article XX essentially meaningless. The Foreign Claims Act, 10 U.S.C. Sec. 2734 (1988), which predates Article XX, provides generally for payment of claims by the United States Armed Forces, but specifically excludes claims arising from combat operations. Article XX, among other things, was intended to plug that gap. Finally, the second sentence of Article XX provides for authorities of Panama to submit "advice and recommendations on Panamanian law" to U.S. claims authorities for their use in "evaluating liability and amount of damages." The article expressly contemplates that there be an individualized evaluation of liability and damages—a direction inconsistent with a blanket rejection of Petitioners' claims.

The district court had jurisdiction over Petitioners' suit under 28 U.S.C. Sec. 1331 (1988). The district court dismissed the lawsuit on several grounds. The court of appeals affirmed on the sole ground that Article XX "does

---

[6] Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, Military Law Review, vol. 133, Summer 1991, pp. 32-3.

not provide for an individually enforceable right of action to compel payment of Petitioners' claims." App. A at 2a. In so holding, the court of appeals mischaracterized the nature of Petitioners' lawsuit. Petitioners' seek not to "compel payment," as such, but merely to compel the appropriate adjudication of their claims to which they are entitled under Article XX. Such adjudication is readily available through the United States Army Claims Service, which has been paying claims worldwide for decades, has operated a field office in Panama for decades, and has developed cognizable procedures and standards to impart consistency to its handling of claims.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF COMPELLING IMPORTANCE

This case presents legal, moral and humanitarian imperatives for review by this Court. The decision below leaves civilian victims of the invasion of Panama destitute and diminishes worldwide perception of the United States' commitment to its treaty obligations to Panama, a nation with which the U.S. has long had a special relationship.

This court has previously recognized that the resolution of private rights under a treaty, without more, is justification for review by this Court, *Kolovrat v. Oregon*, 366 U.S. 189 (1961). The treaty involved in this case, moreover, has special significance. The United States bears a responsibility for the creation of the nation of Panama. Panamanians and Americans have been living and working together for the past 90 years building and operating a canal. The resulting friendship and interdependence between the two nations is unique.

Review by this Court is all the more imperative because Petitioners are a class of persons otherwise unprotected who must turn to the United States courts for

relief that is desperately needed and available nowhere else. The "obvious importance" of a case has been held to justify this Court's review, *Brown v. Board of Education*, 347 U.S. 483, 488 (1954), and this is just such a case.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FEDERAL COURT

This Court should be guided in this matter by the remarks of Justice Story made in one of its earliest decisions to enforce private treaty rights. "If the treaty admits of two interpretations . . . one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?", *Shanks v. DuPont*, 3 Pet. 242, 249 (1830).

The enforceability of the private rights created by Article XX comprises three discreet issues or prerequisites, each of which has been separately addressed by this Court as well as several circuits:

A. The treaty must enjoy the force of domestic law by virtue of being self-executing or by virtue of legislative implementation.

B. The rights created must accrue to private citizens or parties.

C. The rights created must be susceptible to judicial enforcement.

As to each of these issues, the decision of the court of appeals is incorrect.

A. The Treaty Is Self-Executing.

A treaty is considered "self-executing" when it envinces no requirement of subsequent domestic legislation for its implementation and, as such, is accorded the force of domestic law. *Trans World Airlines, Inc. v. Franklin Mint. Corp.*, 466 U.S. 243, 252 (1984). This Court in

Trans World Airlines, Inc., premised its enforcement of private treaty rights, in part, on its finding that the subject treaty was self-executing. It did likewise in *Cook v. United States*, 288 U.S. 102 (1933). *See also, Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971) (treaty found to be self-executing, but enforcement denied for other reasons).

The text of Article XX is clear in formulating the rights it creates for immediate effect without any requirement of subsequent domestic legislation for their implementation. Such a requirement of subsequent implementation would preclude a treaty's private enforceability in the absence of implementation.

As the D.C. circuit stated in *Hanoch Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984):

> a treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self executing.

Id. at 809.

No such intent is anywhere evident in Article XX. In fact, executory provisions as a precondition to the Treaty's entry into force appear nowhere except in Article II of the Treaty which requires an exchange of instruments reflecting ratification of the Treaty by the signatories' respective legislatures. The exchange of instruments took place on June 16, 1978 in Panama City, Republic of Panama.[7]

As it happens, however, Article XX has been implemented notwithstanding its terms do not require such. The Congress legislated in 1979:

> It is the purpose of this chapter to provide legislation necessary or desirable for the implementation of the Panama Canal Treaty of 1977 between the United

[7] *Exchange of Instruments of Ratification of Panama Canal Treaties*, Department of State Bulletin, July 1978, pp. 52-7.

> States of America and the Republic of Panama and of the related agreements accompanying that Treaty.

22 U.S.C. Sec. 3601 (1988).

Consequently, this action can also be seen as arising under 22 U.S.C. Sec. 3601, implementing or incorporating as it does the very specific terms of Article XX.

B. The Rights Created by Article XX Accrue to Private Panamian Citizens.

The District of Columbia circuit in *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988), refused to find privately enforceable United Nations Charter provisions that applied only to signatory nations. Noting the Charter's reference solely to the rights and obligations of "parties", the court stated that since "only nations can be 'parties' ", individuals enjoyed no private right of enforcement. *Id.* at 938. On the other hand, the same court implied a private right of action for the United States flag merchant fleet, but denied it as to one carrier suing solely on its own behalf in *Rainbow Nav., Inc. v. Department of the Navy*, 911 F.2d 797 (D.C. Cir. 1990). "The Treaty protects the United States flag service as a whole, therefore, rather than any particular carrier." *Id.* at 808.

The Ninth Circuit, for its part, found privately enforceable a treaty creating obligations for the benefit of "the inhabitants" of certain territories in *People of Saipan v. United States Dept. of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

Contrast the treaty language in *Committee of U.S. Citizens* with that of *Asakura v. Seattle*, 265 U.S. 332 (1924). The operative treaty provision in *Asakura* began "The citizens and subjects of each of the High Contracting Parties shall have the liberty to . . . ." *Id.* at 340. This Court in *Asakura* held that provision to be judicially enforceable through private action. Like that provision,

Article XX speaks directly to individual rights. Its effect in creating a private as opposed to public right could not be clearer. The provision posits a right to settlement of claims for "third parties other than . . . the two Governments."

C. The Rights Created by Article XX Are Susceptible to Judicial Enforcement.

This court has stated that it will enforce a treaty which "prescribes a rule by which the rights of a private citizen or subject may be determined." *The Head Money Cases*, 112 U.S. 580, 588-89 (1884).

> An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens.

Id. at 598.

Treaty provisions have been denied judicial enforcement when the subject articles "are phrased in broad generalities, suggesting that they are declarations of principles, not a code of legal rights.", *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985).

Article XX suffers no such vagueness. Under it, injured parties shall present claims "to the appropriate authorities of the United States Forces for settlement." The right is "direct, affirmative" and judicially enforceable by private individuals as held in *People of Saipan*, 502 F.2d at 97.

It is noteworthy that the private right held judicially enforceable in that case arose from a treaty provision calling upon the U.S. to "promote the economic self sufficiency of the inhabitants, and to this end . . . regulate the use of natural resources." *Id.* at 97. The obligation of Article XX is considerably more specific, direct and affirmative.

People of Saipan is especially helpful to an analysis of this matter. In holding the treaty subject of that case to be privately enforceable, the court referred to four factors:

> the purposes of the treaty, and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self or non-self execution [private enforceability or the lack thereof].

502 F.2d at 97.

Applying those considerations to Petitioners' case:

Article I, Paragraph 4 of the Treaty notes the "special relationship" between the U.S. and Panama. Relief for Panamanian innocents victimized in the Canal's defense is certainly consistent with this view. The objective of the Treaty negotiators that these victims enjoy a judicially enforceable right to such relief is clearly implicit in the language of Article XX.

Available to implement directly the relief sought is the U.S. Army Claims Service. The Service has been in the business of paying claims worldwide for decades. It has had a field office in Panama for decades. Certainly the Service has developed cognizable procedures and standards to impart consistency to its dealings.

There is no realistic alternative to this Court as a forum for enforcing the treaty right of the Panamanian victims.

The short term effect of denying the Treaty's enforceability in this case will be the destitution of the victims. The long term effect will be a sharply diminished perception of the United States' commitment to its treaty obligations.

III. JUDICIAL CONSIDERATIONS

The analytical consistency of the foregoing notwithstanding, the area of private treaty enforcement suffers some semantic confusion.

As examples, *Mannington Mills, Inc. v. Congoleum Corp,*. 595 F.2d 1287 (3rd Cir. 1979) and this Court's *Trans World Airlines*, 466 U.S. 243, define "self executing" treaties solely in terms of whether they require domestic implementation in order to assume the force of law. On the other hand, *U.S. v. Thompson*, 928 F.2d 1060 (11th Cir. 1991); *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18 (2d Cir. 1988); *U.S. v. Bent-Santana*, 774 F.2d 1545 (5th Cir. 1985); and *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976), define "self executing" treaties solely by reference to the nature or beneficiaries of the rights delineated therein. Too few decisions, such as *People of Saipan*, 502 F.2d 90, apply the term to encompass both concerns.

Granting this Petition would enable this Court to formulate a comprehensive analytical framework and impart clarity to the matter.

CONCLUSION

Petitioners' right of action under Article XX is clear.

This Petition presents this Court with an issue of first impression, the question of private rights under Article XX not having been addressed by any court prior to this action. The issue arises from one of the most dramatic foreign policy initiatives of its decade and touches in a fundamental and ongoing way those most harshly affected by that initiaitve. They are many in number, desperately and clearly deserving under the Treaty of the relief they seek and utterly dependant on this Court for it. The legal, moral and humanitarian imperatives for enabling Petitioners' lawsuit are inescapable.

The Petition for Certiorari should be granted.

Respectfully submitted,

DAVID J. KIYONAGA
Counsel of Record
JOHN C. KIYONAGA
KIYONAGA & KIYONAGA
117 South Fayette Street
Alexandria, VA 22314
(703) 739-0009
Counsel for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5173

MARICELA MCFARLAND, on her own behalf and on that of her daughter, KRISTEL, *et al.*,
Appellants

v.

RICHARD B. CHENEY, Secretary, Department of Defense, *et al.*

And Consolidated Case No. 92-5022

BEFORE: Wald, Edwards and Williams, Circuit Judges

ORDER

[Filed Jun 9, 1992]

Upon consideration of the court's order to show cause, filed March 26, 1992, the response thereto and the reply, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the district court's April 30, 1991 order dismising appellants' action in 90cv02405 be summarily affirmed. Appellees' refusal to establish a claims program under the Foreign Claims Act, 10 U.S.C. § 2734, is not subject to judicial review. 10 U.S.C. § 2735; *see Saltany v. Reagan*, 702 F. Supp. 319, 321 n.4 (D.D.C. 1988), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989) (per

curiam), *cert. denied*, 495 U.S. 932 (1990); *cf. Broadnax v. United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (per curiam). The merits of the parties' positions are so clear as to justify summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the district court's December 18, 1991 memorandum and order dismising appellants' action in 91cv01438 be summarily affirmed. The district court correctly concluded that article XX of the Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., 33 U.S.T. 307, 343-46, does not provide for an individually enforceable right of action to compel payment of appellants' claims. The merits of the parties' positions are so clear as to justify summary action.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2405 SSH

MARICELA MCFARLAND, *et al.*,
Plaintiffs,

v.

RICHARD B. CHENEY, *et al.*,
Defendants.

ORDER

[Filed Apr. 30, 1991]

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States*, Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694.

Plaintiffs have filed a motion to lift the stay in this case, on grounds that the issues presented in this case "are not closely related to the issues presented in [the other sixteen related cases]." It is true that plaintiffs in this case have brought their complaint under the Administrative Procedure Act rather than the Federal Tort Claims Act, and that they have structured their demand

so as to seek equitable relief. Nevertheless, the Court finds that, as with the related sixteen cases, these plaintiffs have presented a nonjusticiable political question.[1] See the Court's Opinion filed today in Civil Action No. 90-1694 and atached hereto. Accordingly, it, too, must be dismissed. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted. It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in Part B of the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States District Judge

Date: Apr. 30, 1991

[1] Indeed, the mandamus relief that plaintiffs in this case seek is truly extraordinary and unsuitable for judicial resolution.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1694 SSH

INDUSTRIA PANIFICADORA, S.A.,
INMOBILIARIA SANTA ANA, S.A.,
and F.X. VIDEO CLUB, S.A.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

OPINION

[Filed Apr. 30, 1991]

This matter is before the Court on the motion of defendant United States of America to dismiss the complaint in the above-entitled action. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

Background

In considering a motion to dismiss, the Court must accept as true the factual allegations of plaintiffs' complaint, and any ambiguities must be resolved in plaintiffs' favor. *See Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). The following facts are taken from the complaint.

Plaintiffs, Industria Panificadora, S.A., Inmobiliaria Santa Ana, S.A., and F.X. Video Club, S.A., have brought this action under the Federal Tort Claims Act (FTCA),

28 U.S.C.A. §§ 2671-2680, and under the Alien Tort Claims Act (ATCA), 28 U.S.C.A. § 1350, to recover damages for property losses.[1] Plaintiffs are corporations organized and existing under the laws of the Republic of Panama, with their principal places of business in Panama City, Panama.

On or about December 20, 1989, United States Armed Forces engaged General Manuel Noriega's Panamanian Defense Force ("PDF") in Panama. The fighting was short-lived. In only a few days, the U.S. Armed Forces had defeated the PDF and caused the removal of General Noriega from power. The U.S. Armed Forces remained in Panama until approximately January 10, 1990. During part of this period, plaintiffs' properties were looted, burned, and destroyed by Panamanian civilians while the PDF, whose duties included the maintenance of public order, was engaged militarily with the U.S. Armed Forces. Attributing their property damages to defendant's alleged negligence, plaintiffs submitted claims to the United States Department of State for compensation. These claims were rejected. Through this action, plaintiffs now seek recovery for damages in the amount of $1,506,823.00.

[1] In addition, sixteen related cases have been filed. Eleven cases were stayed by the Court's Order of March 14, 1991, pending the resolution of defendant's motion to dismiss in this case. Those cases include the following: Civil Action No. 90-1966; Civil Action No. 90-2264; Civil Action No. 90-2266; Civil Action No. 90-2281; Civil Action No. 90-2405; Civil Action No. 90-2589; Civil Action No. 90-2756; Civil Action No. 90-2823; Civil Action No. 90-2952; Civil Action No. 90-3061; and Civil Action No. 91-118. Subsequent to the issuance of that Order, five more related cases were filed: Civil Action No. 91-495; Civil Action No. 91-596; Civil Action No. 91-887; Civil Action No. 91-925; and Civil Action No. 91-945.

Although the Court stayed those cases for administrative convenience, the Court did review the plaintiffs' arguments in those cases that were briefed, principally in light of the fact that plaintiffs' counsel in some of the cases are different from counsel in the above-captioned case. *See* Plaintiffs' Motion To Lift Stay, filed in Civil Action No. 90-1966.

Plaintiffs assert that the U.S. Armed Forces, by defeating the PDF, assumed the PDF's duty of maintaining public order in the alleged Occupied Zone.[2] Plaintiffs allege that unspecified U.S. personnel in Washington, D.C., breached such a duty by negligently failing to provide adequate numbers of police personnel to maintain public order. (Amended Complaint, paragraph 5.) Plaintiffs assert that they suffered damages as a direct and foreseeable consequence of such a decision.

Defendant argues that plaintiffs' action must be dismissed because the Court lacks subject matter jurisdiction under the FTCA and the ATCA. Alternatively, defendant argues that this suit presents a nonjusticiable political question.

Discussion

A. *Federal Tort Claims Act*

The FTCA was designed to render the United States liable for its torts essentially in the same manner and to the same extent as an individual, in like circumstances, under the law of the place where the wrong occurred. *See United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). However, liability under the Act does not give rise to a carte blanche. The United States is liable only in the manner and to the extent to which it has consented.

[2] One disputed issue is whether the United States owed a duty to plaintiffs of maintaining public law and order under the Hague Convention, to which the United States is a signatory. The Hague Convention would apply where Panama was an "occupied territory." Plaintiffs assert that the U.S. Armed Forces displaced the PDF, thus transforming the area in question into an "occupied territory." Defendant maintains that the increase in U.S. military forces in Panama did not displace the authority of the legitimate government in Panama. (Declaration of Richard A. Clarke.) Defendant also denies plaintiffs' assertion that there was a United States policy decision to assume police power functions in Panama. (Declaration of Richard A. Clarke.) Because this action must be dismissed under the discretionary function exception to the FTCA, it is not necessary to address this issue definitively.

Although the FTCA "waives the Government's immunity from suit in sweeping language," *id.* at 547, the waiver is limited by the terms of the Act's exceptions. If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case. *United States v. Orleans*, 425 U.S. 807, 814 (1976).

In its motion to dismiss, defendant argues that several such exceptions bar suit under the FTCA. They are: (1) the foreign country exception (28 U.S.C.A. § 2680 (k)); (2) the combatant activities exception (28 U.S.C.A. § 2680(j)); (3) the exception that applies where there is no actionable duty under applicable state law (28 U.S.C.A. §§ 1346(b), 2674); and (4) the discretionary function exception (28 U.S.C.A. § 2680(a)). Because the Court finds that the discretionary function exception applies to this case, the remaining three exceptions need not be addressed.

1. *Discretionary Function Exception*

The discretionary function exception includes:

> "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

28 U.S.C.A. § 2680(a).

This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*

(Varig Airlines), 467 U.S. 797, 808 (1984). Where that "boundary" lies, however, has been subject to much interpretation by courts, because Congress did not clearly define "discretionary function." [3]

The discretionary function exception articulates a policy of preventing tort actions from becoming a vehicle for judicial interference with decision-making that is properly exercised by other government branches. The exception embodies the separation of powers. *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The seminal case of *Dalehite v. United States*, 346 U.S. 15 (1953), sets forth a broad interpretation of the exception. In that case, the Court held that the discretionary function exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. *Id.* at 19-21. Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so too were the decisions concerning the specific requirements for manufacturing the fertilizer. *Id.* at 37-38. The Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionry function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans,

---

[3] Historically, the discretionary function derives from the considerable body of case law which gives to federal officials an immunity from suits arising out of certain kinds of official acts. The reason most frequently advanced for this immunity is the fear that the threat of damage suits would stultify decision-making. *See* Note, *Development in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 892 (1957).

> specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. at 35-36.

Unfortunately, the "lower court decisions since *Dalehite* do not comprise particularly coherent body of case law." *Blessing*, 447 F. Supp. at 1172.[4] In determining whether the discretionary function exception applies, some courts have made a distinction between "planning" and "operational" decisions. Such a distinction is confusing because "planning" is seldom one defined stage of an overall operation.[5] "At what point, if any, are programmatic decisions and refinements made at the operational rather than at the planning level?" *Id.* at 1173 n.19. This question exemplifies the line-drawing problem that lower courts have faced in dealing with the discretionary function exception.

---

[4] *Compare, e.g., Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249, 1258-1259 (D.D.C. 1973) (planning and implementation of a riot control program for use during civil orders is a discretionary function), *aff'd*, 497 F.2d 684, *cert. denied*, 419 U.S. 1021 (1974), *with Downs v. United States*, 522 F.2d 990 (6th Cir. 1975) (FBI agent's decision on how to handle an airplane hijacking not a protected act of discretion), *and Miller v. United States*, 410 F. Supp. 425 (E.D. Mich. 1976) (negligent operation of waterworks protected by discretionary function exception), *modified*, 583 F.2d 857 (6th Cir. 1978), *with Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.) (negligent operation of airport control tower not a protected act of discretion), *cert. denied*, 389 U.S. 931 (1967).

[5] The court in *Blessing* summed up this problem, stating "[t]he frontier where planning ends and operations begin . . . is seldom sharply marked. Because plans and programs are not often put into effect mechanically, judgments of varying sorts and degrees must be made in taking all but the most reflexive actions. Accordingly, most operations retain some 'planning' elements right up to the final execution." 447 F. Supp. at 1173 n. 19. In *Dalehite*, the Supreme Court similarly recognized that the "planning" function extends beyond the mere "initiation of programs" and "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." 346 U.S. at 35-36.

Recently, the Supreme Court clarified the planning/operational distinction. The Court criticised lower courts' interpretation of this matter, stating that they were "perpetuating a nonexistent dichotomy between the discretionary functions and operational activities." *United States v. Gaubert*, 59 U.S.L.W. 4244, 4247 (U.S. Mar. 26, 1991) (No. 89-1793). In *Gaubert*, the United States Court of Appeals for the Fifth Circuit had held that the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas had been negligent in carrying out their supervisory activities over certain aspects of a thrift institution's operation and that those actions were not within the discretionary function exception. 885 F.2d 1284 (5th Cir. 1989). The Supreme Court reversed, stating that "[d]iscretionary conduct is not confined to the policy or planning level." 59 U.S.L.W. at 4247. Rather, "[a] discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions." *Id.* at 4247. Moreover, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813.

Other recent cases also have defined the nature of the conduct for which the exception is intended to apply. In *Varig Airlines*, the Court held that the Federal Aviation Administration's actions in formulating and implementing a "spot-check" plan for airplane inspection was protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes. *Id.* at 815. Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent. *Id.* at 820. In *Berkovitz v. United States*, 486 U.S. 531, 533 (1988), the Court examined a comprehensive regulatory scheme governing the licensing of laboratories to produce polio vaccines and the release of particular drugs to the public. The Court found that some of the claims fell outside the exception,

but only because the agency employees had failed to follow the specific directions contained in the applicable regulations, and that in those instances, there was no room for choice or judgment. *Id.* at 542-543. The case was remanded for analysis of the remaining claims in light of the applicable regulations. *Id.* at 544. The Court stated: "[A]ssuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function was designed to shield." *Id.* at 536.

The nature of the conduct reviewed in *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974), is comparable to that of the instant case. In *Monarch*, this court held that the discretionary function exception barred claims challenging the adequacy of troops and police forces assigned in connection with third-party looting following the assassination of Dr. Martin Luther King, Jr. Similarly, in *Smith v. United States*, 330 F. Supp. 867 (E.D. Mich. 1971), the court held that the discretionary function exception applied. The plaintiff Smith, who was shot by National Guardsmen during a city riot, alleged negligence on the part of the Secretary of Defense and high-ranking officers of the National Guard and the Army. *Id.* at 868. The court stated:

> The means and method of restoring order in a city faced with anarchy and breakdown of civilian authority are delegated to the Executive Branch of the Government, not the judiciary. That some may say with the wisdom of hindsight that the National Guard was not sufficiently prepared to cope with the delicate task of quelling a riot . . . does not create a cause of action. It is more appropriately a plea addressed to the legislative and executive branches of the Government.

Id. at 869.

In addition, it is clear that the discretionary function exception protects military policy judgments. In *Boyle v. United Technologies Corp.*, the Court stated:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [28 U.S.C.A. § 2680(a)]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

487 U.S. 500, 511 (1988).

The discretionary function exception is clearly applicable to the instant case. This case involves Executive Branch judgments that are grounded in political, military, and foreign policy considerations. Plaintiffs' amended complaint unquestionably challenges Executive Branch decisions concerning the numbers of military personnel to be utilized, their deployment, and the kinds of orders that should be issued in furtherance thereof.

Plaintiffs assert that "[t]he record in this case is admittedly far too preliminary for any positive conclusions at this time, but it is clear that the negligence alleged does not involve the formulation of policy or the performance of any quasi-legislative or judicial functions." (Plaintiffs' Opposition, at 27-28.) The facts show otherwise. In their amended complaint, plaintiffs assert that the "high officials" in Washington who "planned" the military action were negligent, not the U.S. personnel in Panama that handled the "operational" matters. Plaintiffs assert that this case does not question military strategy or foreign policy decisions by the Executive Branch. Yet they seek to distinguish the decision to undertake military action from the decision on how many military police to utilize in Panama. They do not question the U.S. decision to engage the PDF, but they do question

the Executive Branch's decision on how to handle the aftermath of the initial attack. Because both decisions involved planning of the U.S. military operation in Panama, this distinction is unconvincing.

Although plaintiffs urge that the United States has consented to this lawsuit and is liable for negligent acts at the "operational level," the Court concludes that their factual allegations fall squarely within the area of the discretionary function exception.[6]

B. *Nonjusticiable Political Question*

Defendant also argues that plaintiffs' action should be dismissed because it involves a nonjusticiable political question. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986). Both the separation of powers doctrine and the policy of judicial self-restraint require that federal courts refrain from intrusion into areas committed by the Constitution to the Legislative and Executive Branches of the Government. *Baker v. Carr*, 369 U.S. 186 (1962). The Supreme Court has defined "nonjusticiability" as "the inappropriateness of the subject matter for judicial consideration." *Id.* at 198. The Court also has defined those elements that serve to identify nonjusticiable political questions. It has stated:

---

[6] Plaintiffs also purport to bring this action under the Alien Tort Claims Act, 28 U.S.C.A. § 1350. However, defendant correctly argues that the ATCA is not itself a waiver of the sovereign immunity of the United States. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985). Plaintiffs argue that the waiver is provided by the FTCA. However, because this case falls within the discretionary function exception, sovereign immunity has not been waived.

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

If one of these conditions is inextricable from the case at bar, then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court. *Id. See also Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1335 (S.D.N.Y. 1984). However, while only one of these elements must be present, it must be significant for there to be a nonjusticiable political question. *Baker*, 369 U.S. at 217. The Court finds that several of the *Baker* elements present themselves in the instant case.

Plaintiffs' allegations fall within the first element discussed in *Baker*. It is well established that decisions pertaining to national security, such as whether and how to use military forces, are entrusted to the political branches. CONST. Art. II.[7]

---

[7] There is considerable case law in this area. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) (matters closely related to foreign policy and national security rarely proper for judicial intervention); *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (Article II, § 2 of the Constitution is a "specific textual commitment

In addition, the instant case falls within the second element of *Baker*, because decisions which affect our national security involve policy decisions beyond the scope of judicial expertise. "To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch." *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 616 (D.D.C. 1984), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987).

The issues of the instant case are comparable to those in *Nejad v. United States*, 724 F. Supp. 753, 754 (C.D. Cal. 1989). In that case, plaintiffs brought an FTCA action based upon the Navy's shooting down of an Iranian airliner over the Persian Gulf. Plaintiffs asserted that the political question doctrine should not apply because they did not challenge the President's decision to send warships to the Persian Gulf but only the manner in which the President's decision was carried out by the Navy. The court rejected such a distinction, stating:

> Here, it is indubitably clear that plaintiffs' claim calls into question the Navy's decisions and actions in execution of those decisions. The conduct of such affairs are constitutionally committed to the President as Commander in Chief and to his military and naval subordinates. Thus, the claim here implicates possibly all and at least formulations [1], [4], [5] and [6] of *Baker v. Carr*. Plaintiffs contend that they do not call into question the President's decision to send U.S. warships to the Persian Gulf, but only the negligent manner in which the President's decision was carried out. This contention too must fail.

---

of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief"); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954) (responsibility for dealing with foreign nations over the seizure of American property or persons is clearly committed to the President), *cert. denied*, 348 U.S. 952 (1955).

> [T]he same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates. The textual commitment to the President as commander in chief of authority for military decision entails that his decision may be implemented without judicial scrutiny. . . .

Id. (quoting *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980)).

Similarly, this court in *Monarch* stated that "[p]olicy considerations directly related to objectives which are, in the strictest sense of the term, governmental or political pervade every phase of planning and executing a riot control program. Such considerations point not only to discretionary functions free from liability under the Tort Claims Act but to political questions which are beyond the jurisdiction of this Court." 353 F. Supp. at 1258.

In the instant case, plaintiffs assert that their suit "does not call into question any foreign policy or military decision by the President or any other policy maker in the Executive Branch." (Plaintiffs' Opposition, at 37.) Plaintiffs state that their suit is "for property damages caused by negligence in the exercise of police power." (Plaintiffs' Opposition, at 37.) At the same time, plaintiffs assert that "[t]he negligence on which this action is based is the failure by the United States personnel located in Washington, and in command of the military incursion, to assign sufficient military police after the civil disorders in Panama City occurred." (Plaintiffs' Opposition, at 21.)

Plaintiffs' assertions contradict themselves. The decision on how many military police to assign to Panama was a decision made by the military. Thus, while plaintiffs carefully worded their amended complaint to suggest a basis in traditional tort concepts of due care and negligence, their allegations implicate broader political ques-

tions that encompass U.S. foreign policy and military operations. Any judicial inquiry into the reasonableness of the decisions at issue would require that this Court second-guess Executive Branch decisions, some of which were made while military personnel were engaged in combat. Such an inquiry would be fraught with national security considerations and unmanageable political and military issues. Not only are there no judicially manageable standards for the Court to follow in resolving these issues, but an independent resolution would show a lack of respect due to a coordinate branch. Although plaintiffs contend that this case does not possess those elements set forth in *Baker*, the facts show that plaintiffs' action involves judicial review of executive branch decisions pertaining to the nature, conduct, and implementation of a presidentially-directed military operation in a foreign country. This goes to the heart of the political question doctrine. Therefore, the Court concludes that plaintiffs' claim presents a clear nonjusticiable political question. Because plaintiffs' claims fall within the discretionary function exception to the FTCA and because they present a nonjusticiable political question, the case must be dismissed.[8]

An appropriate Order accompanies this Opinion.[9]

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States District Judge

Date: Apr. 30, 1991

---

[8] In light of the Court's ruling, and in the interest of efficient administration in the event of an appeal, the Court will lift the stays in the eleven cases set forth *supra* in footnote 1, and simultaneously will dismiss all sixteen related cases for the reasons set forth above.

[9] The Court is sympathetic to the circumstances which led to the filing of these related lawsuits; the Court deplores the looting and pillaging by Panamanian civilians which led to the losses plaintiffs have suffered. However, these cannot be a judicially imposed remedy for all wrongs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1694 SSH

INDUSTRIA PANIFICADORA, S.A., IMMOBILIARIA SANTA ANA, S.A., and F.X. VIDEO CLUB, S.A.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Upon consideration of defendant's motion to dismiss, plaintiffs' opposition thereto, and the entire record herein, for the reasons set forth in the accompanying Opinion, it hereby is

ORDERED, that defendant's motion is granted and the case is dismissed.

SO ORDERED.

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States District Judge

Date: Apr. 30, 1981

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1438

MARICELA MCFARLAND, on her own behalf
and that of her daughter, KRISTEL, *et al.*,
Plaintiffs,

v.

RICHARD B. CHENEY,
Secretary of Defense, *et al.*,
Defendants.

MEMORANDUM

[Filed Dec. 18, 1991]

Plaintiffs in this class action are Panamanian civilians who allegedly were injured, killed, or who suffered property damage during "Operation Just Cause," the 1989 invasion of Panama by the Armed Forces of the United States. After their damages claims were denied by the U.S. Army Claims Service as combat claims prohibited by the Foreign Claims Act, 10 U.S.C. § 2734, plaintiffs filed a prior complaint in this Court seeking to compel the Claims Service to adjudicate their claims. That complaint was dismissed as a nonjusticiable political question. Plaintiffs now attempt for the second time by complaint filed in this Court to obtain judicial recognition of their claims. Defendants have again moved to dismiss and the motion has been fully briefed.

This renewed claim is wholly without merit and the complaint must be dismissed.

Plaintiffs' claims were considered in a prior case by another Judge of this Court and dismissed on April 30,

1991, *see McFarland et al. v. Cheney et al.*, C.A. 90-2405, Order (D.D.C. April 30, 1991), along with some 17 related claims, all of which were disposed of under the caption of the lead case, *Industria Panificadora, S.A., et al. v. United States*, C.A. No. 90-1694, slip op. (D.D.C. April 30, 1991). The entire group of cases is now pending on appeal. This second action seeks the same relief for the same parties against the same defendants based on the same activity. It is therefore barred by well-established principles of res judicata.

In their complaint in this action, plaintiffs made no reference to the prior action, apparently because they contemplated that the clear strictures of res judicata could be avoided by changing the format of their approach and adding a new basis for jurisdiction to those previously advanced. The new claim is founded on The Panama Canal Treaty of 1977, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10032, rather than the Administrative Procedure Act. But the rules of res judicata, which are designed to require a plaintiff to try his whole case in a single effort, cannot be so easily avoided. *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 320 (1927); *Montana v. United States*, 440 U.S. 147, 153-54 (1979). The doctrine of res judicata runs not only against grounds for recovery previously attempted, but also against new grounds and theories that could have been presented at the same time. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552 (1990); *Stark v. Starr*, 94 U.S. 477, 485 (1877). It is significant that plaintiffs are seeking the same relief under the Treaty cited above as they sought in their previous complaint.

The earlier case was dismissed for nonjusticiability as a political question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). Here, however, the Court needs not rely on the political question doctrine to dismiss the complaint. The Treaty cited by plaintiffs simply gives claimants the right to present claims to "the appropriate authorities of

the Armed Forces for settlement." Panama Canal Treaty, *supra*, at art. XX(8). The plaintiffs did so, and those authorities denied their claims. Both the statute and applicable precedent are clear that determinations of the settlement authorities of the armed forces are not reviewable, except in extraordinary circumstances; and no such circumstances exist here. *See* 10 U.S.C. § 2735; *Broadnax v. United States Navy*, 710 F.2d 865, 867 (D.C. Cir. 1983). There is nothing in the Treaty which provides an individual cause of action to Panamanian citizens in federal courts;[1] nor is there any duty on the part of the defendants that this Court has the power to enforce.[2] Rather, any further enforcement of the Treaty, beyond that explicitly provided in the terms of the Treaty and the relevant statutes, is left to the historic processes of diplomacy.

Accordingly, although the Court has jurisdiction to consider the various claims advanced and the opposing motion, the complaint is dismissed, with prejudice. Defendants are awarded their costs, to be fixed by the Clerk. An appropriate Order is filed herewith.

/s/ Gerhard A. Gesell
United States District Judge

December 17, 1991.

---

[1] Similarly, plaintiffs have not shown that the United States has waived its sovereign immunity beyond the terms of the Treaty and the military claims statutes. This Court would therefore also not have any authority in any way to require the Army to pay claims brought by plaintiffs.

[2] The affidavit of Dr. Carlos Alfredo Lopez-Guevara, which was submitted by plaintiffs in support of their opposition motion, does not affect this analysis.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-1438

MARICELA MCFARLAND, on her own behalf and that of her daughter, KRISTEL, *et al.*,
Plaintiffs,

v.

RICHARD B. CHENEY, Secretary of Defense, *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum, after consideration of the briefs filed by both sides and the record herein, it is hereby

ORDERED that defendants' motion to dismiss is granted; and it is further

ORDERED that the complaint is dismissed with prejudice.

/s/ Gerhard A. Gesell
United States District Judge

December 17, 1991.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5173

MARICELA MCFARLAND, on her own behalf and on that of her daughter, KRISTEL, *et al.*,
Appellants,

v.

RICHARD B. CHENEY, Secretary,
Department of Defense, *et al.*

BEFORE: Wald, Edwards and Williams, Circuit Judges

ORDER

[Filed Aug. 12, 1992]

Upon consideration of appellants' petition for rehearing, filed July 24, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX F

AGREEMENT IN IMPLEMENTATION OF ARTICLE IV OF THE PANAMA CANAL TREATY

* * * *

ARTICLE XX

CLAIMS

(1) Each Government waives its claims against the other Government for damage to any property owned by it and used by its land, sea or air armed services, in the following circumstances:

(a) If the damage was caused by a member or an employee of the armed services of the other Government, in the performance of his official duties; or,

(b) If the damage arose from the use of any vehicle, vessel or aircraft owned by the other Government and used by its armed services, provided either that the vehicle, vessel or aircraft causing the damage was being used for official purposes, or that the damage was caused to property being so used.

(2) In the case of damage caused or arising as stated in paragraph (1), to other property owned by either Government and located in the Republic of Panama, the claims shall be settled by the Government against which the claim is made. If it is not settled in due course, the claim may be pursued through diplomatic channels. Both Governments hereby waive the collection of any claims for an amount less than $1,400 U.S. or B/.1,400 which are of equal value.

(3) In cases of maritime salvage, each Government waives its claims against the other if the vessel or cargo salved was the property of the other Government and was used by its armed services for official purposes.

(4) For the purposes of this Article, any vessel chartered, requisitioned or seized in prize by a Government

shall be considered its property (except to the extent that the risk of loss or liability is assumed by some other person than such Government).

(5) Each Government waives its claims against the other Government for injury or death suffered by any member of its armed services while said member was engaged in the performance of his official duties.

(6) The members of the Forces and the civilian employees of the United States Forces shall be subject to the jurisdiction of the civil courts of the Republic of Panama except in matters which arise from the performance of their official duty. In cases where payment has been accepted in full satisfaction of the claim, the civil courts of the Republic of Panama shall dismiss any proceeding concerning the matter.

(7) When personal private property subject to seizure or attachment by order of a competent authority under Panamanian law is within the defense sites, the United States authorities shall render, upon request of the Panamanian authorities, all assistance within their power in order that such property is turned over promptly to the Panamanian authorities. This paragraph shall not apply to personal property which, although privately owned, is in use by or on behalf of the United States Forces.

(8) Non-contractual claims arising from damages caused in the performance of their official duties by members or civilian employees of the United States Forces to third parties other than the two Governments shall be presented by the injured party through the Joint Committee to the appropriate authorities of the United States Forces for settlement. The authorities of the Republic of Panama may submit advice and recommendations on Panamanian law to the claim authorities of the United States for their use in evaluating liability and amount of damages.

(9) For other non-contractual claims against the members of the Forces or the civilian component, the authori-

ties of the United States, following consultation with the appropriate authorities of the Government of Panama, shall consider the claim and, if appropriate, offer an *ex gratia* payment.

(10) The authorities of both Governments shall cooperate in the investigation and procurement of evidence for a fair disposition of claims under this Article.

(11) Contractual claims against the United States Forces shall be settled in accordance with the dispute clause of the contracts, and in the absence of such clause, through presentation of claims to the United States authorities through the appropriate channels.

(12) The United States Government shall require contractors and subcontractors referred to in Article XII of this Agreement to obtain appropriate insurance to cover the civil liabilities that may be incurred in Panamanian territory as a result of acts or omissions done in the performance of official duty by their employees. The Joint Committee shall establish the general standards for such insurance.

PANAMA CANAL TREATY OF 1977

* * * *

ARTICLE I

* * * *

4. In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall cooperate to assure the uninterrupted and efficient operation of the Panama Canal.

ARTICLE II

RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, signed this date, are exchanged. This Treaty shall enter into force, simultaneously with the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, six calendar months from the date of the exchange of the instruments of ratification.

2. This Treaty shall terminate at noon, Panana time, December 31, 1999.

ARTICLE IV

PROTECTION AND DEFENSE

1. The United States of America, and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date. The use of areas and installations and the legal status of the armed forces of the United States of America in the Republic of Panama shall be governed by the aforesaid Agreement.

APPENDIX G

STATUTORY PROVISIONS

22 U.S.C. § 3601. Congressional statement of purpose

It is the purpose of this chapter to provide legislation necessary or desirable for the implementation of the Panama Canal Treaty of 1977 between the United States of America and the Republic of Panama and of the related agreements accompanying that Treaty.

(Pub.L. 96-70, § 2, Sept. 27, 1979, 93 Stat. 455.)

10 U.S.C. § 2734. Property loss; personal injury or death: incident to non-combat activities of the armed forces; foreign countries

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $100,000, a claim against the United States for—

(1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions and is caused by or is otherwise

incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. The claim of an insured, but not that of a subrogee, may be considered under this subsection. In this section, "foreign country" includes any place under the jurisdiction of the United States in a foreign country. An officer or employee may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

(b) A claim may be allowed under subsection (a) only if—

(1) it is presented within two years after it accrues;

(2) in the case of a national of a country at war with the United States, or of any ally of that country, the claimant is determined by the commission or by the local military commander to be friendly to the United States; and

(3) it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

(c) The Secretary concerned may appoint any officer or employee under the jurisdiction of the Secretary to act as an approval authority for claims determined to be allowed under subsection (a) in an amount in excess of $10,000.

(d) If the Secretary concerned considers that a claim in excess of $100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess of $100,000 to the Comptroller General for payment under section 1304 of title 31 [31 USCS § 1304].

(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

(f) Upon the request of the department concerned, a claim arising in that department and covered by subsection (a) may be settled and paid by a commission appointed under subsection (a) and composed of officers of an armed force under the jurisdiction of another department.

(g) Payment of claims against the Coast Guard arising while it is operating as a service in the Department of Transportation shall be made out of the appropriation for the operating expense of the Coast Guard.

(h) The Secretary of Defense may designate any claims commission appointed under subsection (a) to settle and pay, as provided in this section, claims for damage caused by a civilian employees of the Department of Defense other than an employee of a military department. Payments of claims under this subsection shall be made from appropriations available to the Office of the Secretary of Defense for the payment of claims.

(Aug. 10, 1956, ch 1041, § 1, 70A Stat. 154; Sept. 2, 1958, P. L. 85-861, § 1(55), 72 Stat. 1461; Sept. 1, 1959, P. L. 86-223, § 1(1), 73 Stat. 453; Apr. 8, 1960, P. L. 86-411, 74 Stat. 16; Sept. 26, 1968, P. L. 90-521, §§ 1, 3, 82 Stat. 874; July 8, 1970, P. L. 91-312, § 1, 84 Stat. 412; July 8, 1974, P. L. 93-336, § 2, 88 Stat. 292; Dec. 12, 1980, P. L. 96-513, Title V, Part B, § 511(95), 94 Stat. 2928; Oct. 30, 1984, P. L. 98-564, § 2 98 Stat. 2918.)

APPENDIX H

DR. CARLOS ALFREDO LOPEZ-GUEVARA
Apartado 4493
Panama 5, Republica de Panama

AFFIDAVIT

I served as Special and Extraordinary Ambassador of Panama for Canal Treaty Negotiations. These negotiations produced the Panama Canal Treaty of 1977.

In connection with Article XX, Claims (8) of the Agreement in Implementation of Article IV of the Panama Canal Treaty September 7, 1977, T.I.A.S. 10032, the wording thereof is crystal clear. This section provides an unequivocal right to any person (other than the USA and Panama governments) to claim against the United States for damages sustained through actions or omissions by the Armed Forces of the United States of America in Panama.

This is a direct right to recompense when damages are sustained.

The agreement is not limited to claims arising from non combat operations. As a matter of fact, the provision under examination does *not* make any distinction between combat and non combat operations and therefore, according to Section 31 of the Vienna Convention on the Law of Treaties, must be construed in good faith in accordance with the common meaning of the terms thereof. From the Romans the world inherited the maxim ("Donde la ley no distingue, no le es lícito al hombre distinguir"). (If the law does not make any distinction, it is not lawful for man to distinguish).

Nothing in the text of said provisions (Article XX(8) indicates an intention of the parties to exclude the enforceability of claims arising from combat.

American Forces which came to Panama under Operation Just Cause, operated in Panama under orders of the President of the United States of America, Mr. George Bush. Those soldiers were performing official duties. Those soldiers harmed third persons in the performance of their military duties or in furtherance of orders received from their superiors. Consequently, the U. S. Government is liable for the harm caused by its soldiers.

The treaty foresaw these circumstances and granted a remedy as is spelled out in Article XX(8).

/s/ Dr. Carlos Alfredo López Guevara
DR. CARLOS ALFREDO LOPEZ GUEVARA
LL.B. Panama University—1954
LL.M. Harvard Law School 1957
SJD Harvard Law School 1964
MCJ New York University—
School of Law—1961

Panamá, December 6th, 1991.

AFFIDAVIT

REPUBLIC OF PANAMA
PROVINCE OF PANAMA
CITY OF PANAMA
EMBASSY OF THE UNITED STATES OF AMERICA

I certify that on this 6th day of December 1991, the individual named below appeared before me and, being duly sworn, made the statements set forth in the attached instrument.

DR. CARLOS ALFREDO LOPEZ GUEVARA
Typed Name of Affiant

/s/ W. H. Parsons
Signature of Consular Officer

Wesley H. Parsons
Typed Name of Consular Officer

Consul of the United States of America
Title of Consular Officer

December 6, 1991
Date

(SEAL)

Supreme Court, U.S.
FILED
DEC 18 1992
OFFICE OF THE CLERK

No. 92-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E.L.U.L. REALTY CORP.,

Petitioner,

vs.

GREYHOUND EXHIBITGROUP, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH A. BLOOM
Counsel of Record
DOUGLAS B. LANG
ARNOLD C. JOSEPH
COZEN AND O'CONNOR
Attorneys for Respondent
Greyhound Exhibitgroup, Inc.
45 Broadway Atrium
New York, New York 10006
(212) 509-9400

QUESTIONS PRESENTED

1. Should this Court review a decision of the Court of Appeals for the Second Circuit affirming the District Court's refusal to allow evidence of the comparative fault of the parties at a damages Inquest held after petitioner had defaulted?

2. Should this Court review a decision of the Court of Appeals for the Second Circuit affirming the District Court's determination that petitioner's claim of a set off was barred as a compulsory counterclaim by Fed. R. Civ. P. 13?

3. Should this Court review a decision of the Court of Appeals affirming the District Court's refusal to modify the condition imposed pursuant to Fed. R. Civ. P. 55(c) that petitioner post a $1,000,000 bond in order to vacate the default judgment entered against petitioner?

STATEMENT PURSUANT TO RULE 29.1

Respondent Greyhound Exhibitgroup, Inc. is a wholly owned subsidiary of The Dial Corporation. Greyhound Exhibitgroup, Inc. has no subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
I. E.L.U.L.'S PETITION FOR CERTIORARI IS MERITLESS AND SETS FORTH NO SPECIAL AND IMPORTANT REASONS WARRANTING REVIEW ON WRIT OF CERTIORARI	4
A. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONER, DURING THE INQUEST, TO ARGUE COMPARATIVE FAULT UNDER THE GUISE OF DAMAGE MITIGATION	5
B. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONER A SET OFF AGAINST RESPONDENT'S DAMAGE CLAIM	7

Page

C. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO MODIFY THE CONDITIONS FOR VACATUR OF THE DEFAULT JUDGMENT 8

II. CONCLUSION 9

TABLE OF AUTHORITIES

CASES	Page
Adriana Intern Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990)	5
Benny v. Pipes, 799 F.2d 489 (9th Cir. 1986), cert. denied., 484 U.S. 870 (1987)	5
Dillon v. Twin State Gas & Electric, 163 A. 111 (N.H. 1932)	7
Felhaber v. Indian Trails, 425 F.2d 715 (3d Cir. 1970)	6
Flax v. Koegel, 504 F.2d 702 (2d Cir. 1974)	5
Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d.155 (2nd Cir. 1992)	1
Societe International v. Rogers, 357 U.S. 197 (1958)	8
TWA v. Hughes, 449 F.2d 51 (1971), reversed on other grounds, 409 U.S. 363 (1973)	5
Thorpe v. Thorpe, 364 F.2d 692 (D.C.C. 1966)	8
U.S. v. DiMucci, 879 F.2d 1488 (7th Cir. 1989)	5
STATUTES	
CPLR § 1411	6
Fed. R. Civ. P. 8	4, 5
Fed. R. Civ. P. 13	i, 4, 7, 8
Fed. R. Civ. P. 55(c)	i

No. 92-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E.L.U.L. REALTY CORP.,

Petitioner,

vs.

GREYHOUND EXHIBITGROUP, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Greyhound Exhibitgroup, Inc. ("GEX" or "Respondent") respectfully requests that this Court deny petitioner's writ of certiorari that seeks review of the opinion of the United States Court of Appeals for the Second Circuit, *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, No. 92-7545, reported at 973 F.2d 155.

STATEMENT OF THE CASE

The only facts essential to this Court's determination whether to grant or deny this petition for certiorari of the judgment and opinion of the Court of Appeals for the Second Circuit affirming the District Court are those facts stated below which were misstated by E.L.U.L.

This action arises from a fire which occurred at a large commercial building owned by E.L.U.L. known as 14 Whale Square, Brooklyn, New York (hereinafter "the premises"). Several tenants of the building, including GEX, sustained substantial property damage as a result of the fire. Consequently, on September 30, 1988 GEX commenced this diversity action in the United States District Court for the Eastern District of New York against E.L.U.L., its landlord and the sprinkler system contractor, seeking damages in excess of $1,500,000.00. In its complaint, GEX clearly averred that its damages were the direct and proximate result of the negligence, gross negligence and negligent omissions of E.L.U.L. in turning off an automatic sprinkler system which permitted a trash fire to become a conflagration.

This case was not, as E.L.U.L. would have this court believe, a case of "exacerbation". E.L.U.L. uses that word in its petition to raise, by implication, the concept that there were fire damages which were only exacerbated by E.L.U.L.'s conceded negligence. Nothing could be further from the truth. Had the sprinkler system, which had been deliberately disabled by E.L.U.L., been operative, the trash fire would have been extinguished in its "incipient stage". Hence, absent the rapid and uncontrolled spread of the fire, the only damage suffered by GEX would have been *de minimis*.

E.L.U.L. did not answer or otherwise plead to the complaint and on November 22, 1988, the Honorable Joseph M. McLaughlin, U.S.D.J. signed a Judgment of Default as to liability, which was duly entered by the Clerk. The District Court found that E.L.U.L.'s default was willful based upon, *inter alia*, the encumbering of the premises with a $4.5 million mortgage in violation of a Court Order and conditioned vacatur upon the posting of a $1 million bond.

After E.L.U.L. failed to post the required bond, an Inquest on damages was ordered. On September 27, 1991, the Inquest was commenced before United States District Judge Leo I. Glasser who subsequently referred the proceeding to United States Magistrate Judge John L. Caden. On December 2, 3, 4 and 10, 1991, the Inquest was held before Magistrate Caden to assess GEX's damages. During the Inquest, Magistrate Caden limited the inquiry, over the objection of E.L.U.L., to GEX's damages sustained in the fire. He specifically refused to allow E.L.U.L. to introduce testimony relative to the comparative fault of the parties. Additionally, no evidence was admitted as to those claims of E.L.U.L. against GEX, which were deemed waived by E.L.U.L.'s failure to plead. On February 21, 1992, Magistrate Judge Caden issued a Report and Recommendation which recommended that judgment be entered in the amount of $1,496,425.60 exclusive of interest. By Memorandum Opinion and Order dated April 22, 1992, Judge Glasser, essentially adopted the Magistrate's Report and Recommendation except for minor modifications.

E.L.U.L. appealed the District Court's ruling, attacking, *inter alia*, the court's refusal 1) to modify the bond requirement; 2) to admit evidence relative to the comparative fault of the parties; and 3) to admit evidence concerning any potential set off which E.L.U.L. may have had against GEX's damage claim. The United States Court of Appeals for the Second Circuit affirmed the District Court's judgment finding that the scope of damage mitigation at a post default Inquest is limited to evidence of "proximate cause" as it relates to the calculation of damages. The court also found that E.L.U.L.'s claim against GEX, relative to GEX's alleged failure to indemnify E.L.U.L. by supplying fire insurance, was a compulsory counterclaim and that by failing to assert it in a timely responsive pleading, E.L.U.L. was foreclosed from raising it in any subsequent proceeding, including the post default damages Inquest.

Petitioner has sought a Writ of Certiorari to review the Court of Appeals decision affirming the judgment of the District Court. Specifically, petitioner argues that it has been denied the right

to mitigate the amount of damages which it owes to plaintiff and that it has been denied the right to prove a meritorious defense.

SUMMARY OF ARGUMENT

I. E.L.U.L.'s PETITION FOR CERTIORARI IS MERITLESS AND SETS FORTH NO SPECIAL AND IMPORTANT REASONS WARRANTING REVIEW ON WRIT OF CERTIORARI.

E.L.U.L.'s Petition for Certiorari is meritless and sets forth no special and important reasons warranting review on Writ of Certiorari. The Second Circuit's decision does not conflict with any decision of this Court or with opinions of the other United States Courts of Appeal. Rather, the Second Circuit's decision presents a fact specific application of well settled principles of law. More to the point, it is beyond dispute that where proximate cause, relating to liability, is properly alleged in a complaint, it is completely and irrefutably established upon the defendant's default. Consequently, the relative fault of the parties is not a proper area of inquiry during an Inquest on damages after a default judgment has been entered. Fed. R. Civ. P. 8.

It is equally clear that any claim which E.L.U.L. may have had against GEX, for GEX's alleged breach of its lease obligation to furnish $1,000,000 in fire insurance, was so logically connected to GEX's claim against E.L.U.L. for fire damage, that it constituted a compulsory counterclaim. Thus, by failing to assert it in a timely responsive pleading, E.L.U.L. has forever waived its right, in any proceeding (including the post default damages Inquest) to do so. Fed. R. Civ. P. 13. Finally, it is also beyond argument that the Court of Appeals correctly found that the District Court did not abuse its discretion by refusing to modify the condition which it placed upon the vacatur of default judgment insofar as there was a finding that E.L.U.L.'s default was willful and that it was reasonable to require it to post a bond under the circumstances.

A. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONER, DURING THE INQUEST, TO ARGUE COMPARATIVE FAULT UNDER THE GUISE OF DAMAGE MITIGATION.

There is no conflict among the circuits concerning the consequences of a default judgment. The circuit courts agree that where properly plead proximate cause, going to liability, is completely and irrefutably established upon the defendant's default. *Flax v. Koegel*, 504 F.2d 702 (2d Cir. 1974); *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986), cert. denied., 484 U.S. 870 (1987); *Adriana Intern Corp. v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990); *U.S. v. DiMucci*, 879 F.2d 1488 (7th Cir. 1989). The Second Circuit correctly employed this standard below.

E.L.U.L. pays lip service to the above standard and suggests that Federal Rule of Civil Procedure 8(d) and the Second Circuit decision in *TWA v. Hughes*, 449 F.2d 51 (1971), reversed on other grounds, 409 U.S. 363 (1973) (hereinafter "TWA"), read together, stand for the proposition that where the beneficiary of a default seeks unliquidated damages, that beneficiary must *prove* that the defendant caused the damages before an award can be made. However, neither Rule 8(d) nor *TWA*, *supra*, support such a far reaching proposition. As correctly noted by the majority the damages contemplated by the Rule are damages subject to ministerial valuations rather than to an apportionment of fault. This distinction is readily apparent in the following passage from *TWA*, *supra*.:

> The outerbounds of recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give [plaintiff] a blank check to recover from [defendant] any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense, it was [plaintiff's] burden to show

> "proximate cause." On the other hand, *there was no burden on [plaintiff] to show that any of [defendants] acts caused the well pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused [plaintiff] in dollars and cents.* (emphasis supplied)

As stated by the Second Circuit in the present case:

> There is a categorical distinction between the element of "proximate cause", as it pertains to the assignment of liability in the first instance, and "proximate cause" as it relates to the ministerial calculation of damages in the context of a default judgment. With regard to liability, the concept of proximate cause supplies the legal nexus between act and injury, and provides a necessary basis for avoiding compensation. Where it is properly alleged in a complaint, proximate cause, going to liability, is completely and irrefutably established upon the defendant's default.

Here, GEX in its complaint, sufficiently alleged that E.L.U.L.'s negligence was the proximate cause of the damages suffered in the fire. Those damages were deemed admitted upon E.L.U.L.'s failure to timely answer. Thus, E.L.U.L.'s contention that it should have been permitted to introduce evidence of GEX's comparative negligence, during the inquest, is without merit as the only damage issue to be decided was the identification and valuation of GEX's property damaged and/or destroyed as a proximate result of the fire.

Moreover, the other authorities relied upon by E.L.U.L. are also inopposite. First, the New York Comparative Negligence law, C.P.L.R. 1411 provides that a plaintiff's damages are diminished in proportion to its relative liability. Here, the default established that E.L.U.L. was 100% culpable for all damages. Second, *Felhaber v. Indian Trails*, 425 F.2d 715 (3d Cir. 1970) is distinguishable because the degree of fault between joint tortfeasors was at issue and thus, evidence which went to the question of relative fault between several tortfeasors was required.

Finally, *Dillon v. Twin State Gas & Electric*, 163 A. 111 (N.H. 1932) and other authorities standing for the proposition that a defendant cannot be held liable for injuries caused by others, should be rejected out of hand as irrelevant where, as here, the defendant defaulted and because this issue was not argued below.

B. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONER A SET OFF AGAINST RESPONDENT'S DAMAGE CLAIM.

The Second Circuit ruled that E.L.U.L. was foreclosed, under the compulsory counterclaim provision of Fed. R. Civ. P. 13, from raising a claim for GEX's alleged breach of a lease obligation to furnish $1,000,000 in liability insurance. E.L.U.L. argues that a Writ of Certiorari should be granted because the Second Circuit decision, directly conflicts with recent decisions from the Fifth and Tenth Circuit and most other authorities that have considered the issue. E.L.U.L.'s argument is both factually and legally incorrect.

First, E.L.U.L. once again misstates the facts relative to this issue. E.L.U.L. has never offered any evidence, and none was in the record before the Second Circuit to support the allegation that GEX failed to procure the insurance purportedly required under the lease. In absence of such evidence, E.L.U.L.'s argument is entirely premised upon supposition and speculation and should not be considered by this Court.

Second, in groping for a reviewable issue, Elul disingenuously ignores the majority, opinion holding that its claim for a set off was barred by the compulsory counterclaim provision of Fed. R. Civ. P. 13.

Third, E.L.U.L.'s argument is flawed for a more fundamental reason. In its Petition, E.L.U.L. now suggests for the first time (without any basis) that the Second Circuit affirmed the District

Court's decision to disallow the claim for set off, on the principle of collateral estoppel. A plain reading of the Second Circuit's decision shows that the Circuit Court grounded its decision upon principles attendant to Fed.R.Civ.P. 13(a).

E.L.U.L. raises the issue of collateral estoppel in a desperate attempt to present a reviewable issue. Since the issue of collateral estoppel was neither raised below nor provided a basis for the Second Circuit's decision, this Court should disregard the argument in its entirety and not grant review.

C. THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO MODIFY THE CONDITIONS FOR VACATUR OF THE DEFAULT JUDGMENT.

E.L.U.L. contends that it was deprived of a constitutional right by the District Court's failure to modify the condition to post a $1 million bond to vacate the default. In support of its contention, E.L.U.L. relies primarily upon *Thorpe v. Thorpe*, 364 F.2d 692 (D.C.C. 1966). E.L.U.L.'s reliance upon *Thorpe* is misplaced.

In *Thorpe* the District of Columbia Circuit Court of Appeals held that imposition of a condition that is "impossible" for a party in default to perform may under certain circumstances constitute a denial of due process. In reaching this decision the *Thorpe* court relied upon the decision of the United States Supreme Court in *Societe International v. Rogers*, 357 U.S. 197, 209-210 (1958). This Court in the context of defendant's inability in good faith to produce documents due to the likely imposition of criminal sanctions by a foreign sovereign held that the defendant's due process rights may be implicated by imposition of an "impossible" condition. The *Rogers* Court noted the petitioners had made extensive efforts at compliance and that its inability to comply with the production order was "fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211.

Here, the record is devoid of even a scintilla of evidence to support a claim of a deprivation of a constitutional magnitude. It is beyond cavil that E.L.U.L.'s claim of impossibility of posting the bond rings hollow. At no time did E.L.U.L. objectively demonstrate that it did not have the financial wherewithal to meet the condition imposed by the Court. The record clearly supports that E.L.U.L. had the ability to post the bond had it chosen to do so. In point of fact, Elul did not raise any objection to the condition for vacatur until after the time for their compliance had passed. Moreover, E.L.U.L.'s disingenuous conduct has been exposed throughout these proceedings, by its disregard of Court rules and orders, its concealing of assets and its misrepresentations to the courts below.

Clearly, E.L.U.L. is not a candidate deserving of the relief it presently seeks.

II. CONCLUSION

Respondent, Greyhound Exhibitgroup, Inc., respectfully requests that E.L.U.L.'s petition for a Writ of Certiorari be denied.

Respectfully submitted,

KENNETH A. BLOOM,
Counsel of Record
DOUGLAS B. LANG
ARNOLD C. JOSEPH
COZEN AND O'CONNOR
45 Broadway Atrium
17th Floor
New York, New York 10006
(212) 509-9400

Attorneys for Respondent
Greyhound Exhibitgroup, Inc.

Dated: December 17, 1992